

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:21-cv-00215-MOC
(1:19-cr-00106-MOC-WCM-1)**

ARCHIE ORLANDO PORTER,)	
)	
Petitioner,)	
)	
vs.)	<u>ORDER</u>
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
_____)	

THIS MATTER is before the Court on remand from the Fourth Circuit for the limited purpose of granting or denying a certificate of appealability, [Doc. 7], relative to the Court’s Order on Petitioner’s Section 2255 Motion to Vacate, [Doc. 2].

On September 10, 2021, the Court granted Petitioner’s Section 2255 Motion to Vacate, Set Aside, or Correct Sentence as to Petitioner’s claim that his counsel failed to file a notice of appeal from his criminal judgment after Petitioner clearly instructed counsel to do so. [Doc. 2 at 2-3]. The Court directed the Clerk to prepare an Amended Judgment in Petitioner’s criminal proceedings so that Petitioner could timely appeal that judgment. [Id. at 3]. The Court dismissed the remaining grounds for relief in Petitioner’s motion to vacate without prejudice. [Id.].

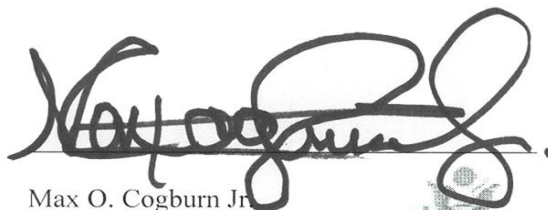
On September 20, 2021, Petitioner timely appealed from the Amended Judgment in his criminal proceeding. [Criminal Case No. 1:19-cr-00106-MOC-WCM-1 (“CR”), Docs. 35, 37]. The Notice of Appeal was properly docketed in Petitioner’s criminal proceeding as an appeal from the Amended Judgment. [See CR Doc. 37]. The same Notice of Appeal, however, was incorrectly docketed in this civil proceeding as an appeal from the Court’s Order on Petitioner’s motion to

vacate. The Notice of Appeal clearly only includes appeal from the Amended Judgment in the criminal proceeding. As such, it does not appear that an order granting or denying a certificate of appealability is necessary. To the extent that one is necessary and the Court's Order, [Doc. 2], may be considered a final order adverse to the applicant as contemplated by 28 U.S.C. § 2253(c)(1), the Court denies a Certificate of Appealability. The Court will direct the Clerk of this Court to correct the docket in this matter to reflect to the true intent of the Notice of Appeal, [Doc. 4].

IT IS, THEREFORE, ORDERED that:

- (1) Pursuant to Rule 11(a) of the Rules Governing Section 2254 and Section 2255 Cases, this Court declines to issue a certificate of appealability on its Order at Docket No. 2 in this matter. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 473, 484 (2000) (when relief is denied on procedural grounds, a petitioner must establish both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right).
- (2) The Court respectfully instructs the Clerk to correct the docket in this matter to remove the references to Docket Nos. 2 and 3 in Docket No. 4 and adjust any other entries necessary to reflect to intent of the Notice of Appeal to appeal from the Amended Judgment [Doc. 35] in Criminal Case No. 1:19-cr-00106-MOC-WCM-1.

Signed: October 28, 2021

A handwritten signature in black ink, appearing to read "Max O. Cogburn Jr.", is written over a horizontal line.

Max O. Cogburn Jr.